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Sam 143

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 37

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, PETITIONER,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR CERTIORARI FILED APRIL 22, 1936.

CERTIORARI GRANTED JUNE 1, 1936.

Supreme Court of the United States

OCTOBER TERM, 1935

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[fol. 1]

IN SUPREME COURT OF MONTANA

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, a Corporation, Plaintiff,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA and James H. Stewart, John J. Greene and Sam D. Goza, members of the State Board of Equalization of the State of Montana, Defendants

COMPLAINT—Filed Nov. 8, 1935

Plaintiff complaining of defendants for cause of action alleges:

I

That at all of the times hereinafter mentioned the plaintiff has been and now is a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and qualified to do and doing business in the State of Montana.

II

That at all of the times hereinafter mentioned the deants James H. Stewart, John J. Greene, and Sam D. Goza have been and now are the duly appointed, qualified and acting members of the State Board of Equalization of the State of Montana.

III

That on and prior to the 10th day of July 1934, the United States of America, for the benefit of the Blackfeet Tribe of Indians of the Blackfeet Indian Reservation in Glacier County, Montana, was the owner of all of the oil, gas and other minerals in and under and that might be produced from the following described lands situated on the Blackfeet Indian Reservation in Glacier County, Montana, to-wit:

Lots Five (5), Six (6), and Seven (7) of Section Ten (10), Township Thirty-four (34) North of Range Six (6) West;

Lot Eight (8), South half of the southwest quarter (S½SW¼) of Section Ten (10), Township Thirty-four (34) North, Range Six (6) West;

[fol. 2] Lot Five (5), Northeast quarter of the northwest quarter (NE¼NW¼) of Section Thirty-four (34), Township Thirty-four (34) North, Range (6) West;

Lots Six (6) and Seven (7), Southeast quarter of the Northwest quarter (SE¼NW¼), Northeast quarter of the southwest quarter (NE¼SW¼) of Section Thirty-four (34), Township Thirty-five (35) North, Range Six (6) West;

Lot Eight (8), Southeast quarter of the southwest quarter (SE¼SW¼) of Section Thirty-four (34), Township Thirty-five (35) North, Range Six (6) West;

Lots Five (5) and Six (6) Section Three (3), Township Thirty-four (34) North, Range Six (6) West, M. P. M.

That on the 10th day of July, 1934, acting in accordance with a resolution of the Blackfeet Tribal Council dated June 4th, 1934, and in accordance with the provisions of law and the regulations of the Department of the Interior of the United States, and for a good and valuable consideration, Forrest R. Stone, Superintendent of the Blackfeet Indian Reservation, as lessor, made, executed and delivered to Consolidated Gas Company, a corporation, of Shelby, Montana, as lessee, a certain oil and gas mining lease in writing covering and including the hereinabove described lands, by the terms of which said lease there was demised, granted, leased and let unto the said lessee for a period of five (5) years from the date of the approval of said lease, and as long thereafter as oil or gas is found in paying quantities, all of the oil and gas deposits in or under the said described lands, a copy of which said oil and gas mining lease, marked Exhibit "A" is attached hereto and by such reference made a part hereof. That thereafter and on the 5th day of October, 1934, the said oil and gas mining lease was duly approved by the First Assistant Secretary of the Interior of the United States, as required by law and the regulations of the Department of the Interior.

IV

That thereafter and for a good and valuable consideration the said Consolidated Gas Company, the lessee named

in said lease, by an instrument in writing duly sold, assigned, transferred and set over unto the plaintiff herein the said oil and gas mining lease and all right, title and interest therein and thereto, together with the privileges and benefits thereunder, a copy of which said assignment is hereto annexed, marked Exhibit "B", and by such reference made a part of this complaint; that said assign-[fol. 3] ment was thereafter, to-wit: on the 15th day of August, 1935, duly approved by the Assistant Secretary of the Interior of the United States, as required by law and the regulations of the Department of the Interior of the United States of America.

V

That pursuant to the terms and provisions of the oil and gas mining lease hereinabove referred to, a copy of which is hereto annexed, marked Exhibit "A", the plaintiff entered upon the hereinabove described lands and proceeded to develop the same for oil and gas purposes and for the production of crude oil, and during the years 1934 and 1935 drilled to completion ten (10) oil and gas wells thereon, all of which wells were productive of and still produce crude oil in paying quantities.

VI

That in the acceptance of said oil and gas mining lease and in the development and operation of the oil and gas wells drilled on said described lands, pursuant to the terms and conditions and provisions of said lease, the plaintiff was and now is acting as and has been and is an instrumentality and an instrument and agent of the United States of America, and as such is not taxable by the State of Montana, and its license or permit to develop and operate said land under said oil and gas lease for the production of oil and gas cannot be taxed by the State of Montana, and that the said State of Montana and its instrumentalities and agents, including the defendants, are wholly without power to tax this plaintiff on its said business of developing said leased lands for production of oil and gas therefrom, either as to the gross production of crude oil from said lands, or the net proceeds derived from the development and operation of said lands for oil and gas or its income from said leased lands by way of corporation license taxes, or taxes on royalty interest on such production, and any

attempted assessments, levies or collections of such taxes on such proceeds or income or royalty are wholly invalid, illegal and unauthorized.

VII

That under and pursuant to the provisions of Sections 2088 to 2096, inclusive, Revised Codes of Montana 1921, as amended, it is the duty of the defendants to compute and assess the net proceeds of all mines and mining claims [fol. 4] in the State of Montana, including the proceeds of all oil wells for the purpose of taxation; that in the computing and assessing of said net proceeds the interest of this plaintiff as lessee is assessed and the royalty interest of the Blackfeet Tribe of Indians is assessed and the taxes on said royalty interest, if assessed and collected are required by law to be paid by this plaintiff.

VIII

That under and pursuant to the provisions of Sections 2397 to 2405, inclusive, Revised Codes of Montana, 1921, as amended, the defendants are required to compute, assess and collect from every person engaged in or carrying on the business of producing within the State of Montana, petroleum or other mineral or crude oil, or engaged in or carrying on the business of owning, controlling, managing, leasing or operation within this State any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, an annual license tax for engaging in and carrying on such business in an amount equal to two percentum of the total gross value of all petroleum and other mineral or crude oil produced by such person within the State of Montana.

IX

That under and pursuant to the provisions of Sections 2088 to 2096, inclusive, Revised Codes of Montana, 1921, as amended, the defendants are required to prepare and submit to the Clerk and Recorder of each County in which mines and mining claims, including oil wells are located, royalty lists or schedules setting forth the names of the royalty owners and the amount of royalty oil which each of them are entitled to and thereupon the County Clerk and Recorder is required to prepare from such schedule a

tax-roll which shall be by him furnished by the County Treasurer; and the County Clerk is required to enter such assessments in the Personal Property Assessment Book under the name of the operator of such mine or oil well, and the operator of such mine or oil well is liable for the payment of such taxes and the County Treasurer is required to collect the same from such operator.

X

[fol. 5] That under and pursuant to the provisions of Sections 2296 to 2304, inclusive, Revised Codes of Montana, 1921, as amended, the defendants are required to compute, assess and collect against this plaintiff a license fee of two percentum of its total net income received during the preceding year from all sources from within the State of Montana, including its net income derived from the exploring, developing and production of oil from lands upon which it owns oil and gas leases, including the aforesaid described leased lands.

XI

That the defendants, acting for the State of Montana, have attempted and are still attempting and threatening to compute, assess, levy and collect the taxes mentioned and set forth in paragraphs VII, VIII and IX herein, that each and all of said taxes so described are based in whole upon the oil and gas produced by this plaintiff as an instrumentality and agent of the United States of America from the aforesaid described leased lands and unless restrained by an order of this Court will continue to and attempt to compute, assess, levy and collect said taxes on said crude oil produced from said leased lands.

XII

That the assessment, levy and collection of such taxes upon such crude oil produced will constitute and cause an irreparable injury and damage to the plaintiff, and will result in a multiplicity of judicial proceedings, in that if the said taxes are computed, levied and assessed it will be necessary for this plaintiff to pay the said taxes under protest and within the time prescribed by law and to commence actions for the recovery of such taxes and each of said payments in the District Court of the county in which

said lands are located, and plaintiff therefore alleges that a restraint of the computing, levying, assessment and collection of said taxes is necessary to prevent a multiplicity of judicial proceedings.

XIII

That the defendants in this action are agents or instrumentalities of the State of Montana; that the public is interested in the outcome of this action; and the rights of the [fol. 6] public are involved in this action.

Wherefore, Plaintiff prays for judgment:

(1) That the defendants be restrained by an injunction of this court from proceeding with the computing, assessment, levying and collection of any of the taxes mentioned and set forth in this Complaint, insofar as the same are based upon crude oil produced or to be produced by this plaintiff from the leased lands described herein; and from taking any action toward such computing, levying, assessment or collection, including the transmittal of assessment reports to the officials of Glacier County, Montana.

(2) For such and other and further relief as to the Court may seem equitable.

E. K. Cheadle, Jr., G. S. Frary, Attorneys for Plaintiff.

[fol. 7] *Duly sworn to by E. K. Cheadle, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 8] EXHIBIT "A" TO COMPLAINT

O. & G. No. 107. Cont. 15–ind–6191.

Article No. 1

Oil and Gas Mining Lease

Tribal Indian Land

This Lease made and entered into, in triplicate on this 10th day of July A. D., 1934 by and between Supt. For-

rest R. Stone, acting for and in behalf of the Blackfeet Tribe of Indians, in accordance with the resolution dated June 4th, 1934, of the Blackfeet Tribal Council, party of the first part, designated as lessor, and Consolidated Gas Company of Shelby, Montana, party of the second part, designated as lessee, under and in pursuance of Section 3 of the Act approved February 28, 1891 (26 Stat. L., 795), as amended by the Act approved May 29, 1924 (Public No. 158, 68th Congress),

Witnesseth:

1. The lessor, in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations and conditions herein contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for five years from the date of approval hereof, and as long thereafter as oil or gas is found in paying quantities, all the oil and gas deposits in or under the lands described as follows, to-wit:

Lots 5, 6, and 7 section ten, township thirty four north, range six west, M.M.

Lots 8, S/2 SW/4, section ten, township thirty-four north, range six West, M.M.

Lots 5, NE/4 NW/4, section thirty four, township thirty four north range six west, M.M.

Lots 6 & 7, SE/4, NE/4, SW/4, section thirty four, township thirty five range six West, M.M. totalling 687.26 acres, more or less.

[fol. 9] 2. The lessee hereby agrees to pay or cause to be paid to the officer of the United States having jurisdiction over the leased premises, hereinafter called the officer in charge, for the use and benefit of the lessor, as royalty 12½% of the gross proceeds of all crude oil extracted from the saie lands unless the lessor with the approval of the Secretary of the Interior, shall elect to take the royalty in oil, such payment to be made at the time of sale or removal of the oil.

Should the lessor, with the approval of the Secretary of the Interior, elect to take the royalty in oil, the lessee shall furnish free storage for the royalty oil for not exceeding thirty days.

In time of war or other public emergency any of the executive departments of the United States Government shall have the option to purchase at the highest posted market price on the date of sale all or any part of the oil produced under this lease.

The royalty on gas, whether it shall be gas from which the casing-head gasoline has been extracted or otherwise, shall be 12½% of the value thereof in the field where produced when the average daily production for the calendar month from the land leased is less than 3,000,000 cubic feet, and 16 2/3 per cent of the value thereof when the average daily production for the calendar month is 3,000,000 cubic feet or more: Provided, That where well- produce both oil and gas or oil and gas and water to such an extent that the gas is unfit for ordinary domestic purposes, but is used temporarily in connection with drilling and pumping operations on adjacent or near-by tracts, the lessee shall pay royalty at the rate of 12½ per cent of the gross proceeds of the sale of gas from such wells. Failure on the part of the lessee to use a gas-producing well which cannot profitably be utilized at the rate herein named shall not work a forfeiture of this lease so far as it relates to mining oil, but if the lessee desires to retain gas-producing privileges he shall pay a rental of $100 per annum in advance, calculated from the date of the discovery of gas on each [fol. 10] gas-producing well, the gas from which is not marketed nor utilized other than for operations under this lease.

On casing-head gas used or sold for the manufacture of casing-head gasoline, the rate of royalty shall be 12½ per cent of the value of the casing-head gas, which value shall be determined and computed on the basis and in the manner provided in the regulations governing the utilization of casing-head gas produced from oil wells on restricted Indian lands. In cases where gas produced and sold has a value for drip gasoline, casing-head gasoline content, and as dry gas from which the casing-head gasoline has been extracted, then the royalties above provided shall be paid on all such values. The lessor shall have the right to the use of gas delivered at the well or at the nearest trunk line for any desired school or other building belonging to the tribe, but the lessee shall not be required to pay royalty on gas so used. Payments of annual gas royalties shall

be made within 25 days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same, and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove any casings in producing wells, or, without the written consent of the lessor, remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, excepting tools, derricks, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee and may be removed at any time prior [fol. 11] to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purposes than those authorized in the lease, and before abandoning any well shall securely plug same so as effectually to shut off all water from the oil or gas bearing strata. Failure to so plug a well as to effectually shut off the water from the oil or gas strata shall be a violation of one of the material and substantial terms and conditions of this lease. The lessee agrees that if a non-producing oil and gas well develops usable water it may be turned over to the reservation without plugging and on such terms as may be agreed upon by the contracting parties, it being, however, definitely understood that the lessor shall in no case be required to pay more than the actual market value of whatever casing is left in the well in order to secure the same for the reservation.

6. The lessee shall keep an accurate account of all oil mining operations showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed;

and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property, and also upon all the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may, with consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease cancelled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder; Provided, That if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.

[fol. 12] 8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties.

9. The lessee hereby agrees that he will not assign or sublet any part of the lands herein leased without the written consent of the Secretary of the Interior being first obtained. The assignment of this lease or any interest herein without such written consent shall constitute a violation of one of the material and substantial terms and conditions of this lease and be cause for cancellation thereof.

10. In the event of failure or neglect of the lessee to perform any obligations under this lease, the Secretary of the Interior shall have the right, at any time after thirty days' notice to the lessee specifying the terms and conditions violated, to cancel this lease.

11. The lessee agrees that he will keep all highways on the reservation used by him in as good state of repair as he finds the same.

12. This lease is made and accepted subject to existing law and any laws hereafter enacted by Congress as to the said lands, also the regulations relative to such leases heretofore or hereafter prescribed by the Secretary of the In-

terior, and in no event shall the United States or the Secretary of the Interior be liable for damages or otherwise under the provisions hereof, and before this lease shall become effective the lessee shall furnish a satisfactory bond as required by the regulations. The obligations and agreements hereinbefore expressed shall extend to and be binding upon the successors in the interest of the parties hereto.

[fol. 13] In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Forrest R. Stone. (Seal.) ——— ———. (Seal.)

Witnesses: Two Witnesses to Lessor: ——— ———. ——— ———.

Consolidated Gas Co., (Seal.) By James W. Johnson, President. (Seal.)

Two Witnesses to Lessee: ——— ———. Attest: P. R. MacHale, Secretary. (Seal.)

Acknowledgment of Individual

STATE OF MONTANA,
County of Toole, ss:

Before me, a notary public in and for said county and State, on this 23rd day of July, 1934, personally appeared James S. Johnson and P. R. MacHale known to me to be the identical persons who executed the within and foregoing lease, as President and Secretary of Consolidated Gas Company respectively and acknowledge- to me that such corporation executed the same as its free and voluntary act and deed for the uses and purposes therein set forth.

E. K. Cheadle, Jr., Notary Public. My commission expires January 14, 1935. (Seal.)

[fol. 14] Amendments to Form 5–157

Approved:

(3) Until a producing well is completed on said premises, the lessee shall pay, or cause to be paid, to the Superintendent of the Blackfeet Agency, for the use and benefit of the lessor, as advance rentals one dollar per acre per annum

from the date of approval of this lease. It is understood and agreed that such sum of money so paid shall be a credit on stipulated royalties for the year for which the payment of advance rentals is made, and the lessee hereby agrees that said advance rentals when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation hereof; nor shall the lessee be relieved from the obligation to pay said advance rental annually, when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

Proposed:

(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days after date of approval hereof by the Secretary of the Interior, and to drill at least ten (10) wells on the premises within one year from date of such approval; and thereafter to diligently drill such additional wells as may be necessary and proper in the judgment of the Secretary of the Interior to fully develop the land and extract the oil and gas therefrom in accordance with the most approved methods of drilling development in the field where these lands are located. It is further understood and agreed that the completion of a well is to be considered a minimum depth of one hundred (100) feet into the Madison limestone, unless production in paying qualities is found at a lesser depth. If the lessee shall fail to drill any or all of the wells as herein provided, [fol. 15] such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease; but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation; Provided that if the lessee desires to continue possession of said lease he must, within thirty days of the completion of one well, commence the drilling of a second well, or such well as the case may be and continue drilling same diligently until completed; Provided further, however, That the Secretary of the Interior may, in his discretion, upon application of the lessee, extend the time within which any well shall be commenced, upon the payment of annual rental of one dollar per acre, for each whole year the beginning of such well is delayed. For the guidance of the Secretary of the Interior, the Blackfeet

Tribal Business Council will be consulted as to its opinion in this matter. It is further understood and agreed that if the lessee shall fail or or refuse to drill as provided herein, or fail to obtain an extension of time within which to drill, he shall pay to the officer in charge, for the benefit of the Blackfeet Tribe of Indians, the full amount for which this lease is bonded.

Approved:

(4a) The lessee or assignee, in consideration of the rights herein granted, agrees to abide by the Code of Fair Competition for the Petroleum Industry as approved by the President of the United States on August 19, 1933, and any modification thereof made heretofore or hereafter, so long as such code shall remain in effect, and to abide by the provisions of any Act of Congress heretofore or hereafter enacted, or any code or regulatory.

[fol. 16] Acknowledgment of Corporation

STATE OF ——,
County of ——, ss:

On this — day of ——, A. D., 19—, before me a —— within and for the state and county aforesaid, personally appeared —— and —— to me personally known, who being by me duly sworn, did each day that —— is the president and —— is the secretary of ——, a corporation, and that the seal affixed to the aforegoing and annexed instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said —— and —— duly acknowledged that they had in their said official capacities executed the foregoing instrument as the act and deed of the said company for the consideration and purposes therein mentioned and set forth.

Witness my hand and official seal this — day of —— 19—.

——.

My commission expires —— —, ——.

Department of the Interior

United States Indian Service

Blackfeet Agency, Browning, Montana

September 26, 1934.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be ——. See my report of even date.

Forrest R. Stone, Superintendent.

[fol. 17] Office of Indian Affairs

Washington, D. C., Oct. 2, 1934.

Respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

William Zimmerman, Jr., Assistant Commissioner.

(Stamp.)

Washington, D. C., Oct. 5, 1934.

The within lease is approved.

T. A. Walters, First Assistant Secretary of the Interior.

(Stamp.)

[fol. 18] EXHIBIT "B" TO COMPLAINT

5-154e

(Must be Executed in Quadruplicate)

Assignment of Oil and Gas Mining Lease

Whereas the Secretary of the Interior has heretofore approved oil and gas mining lease, dated July 10th, 1934, entered into by and between Consolidated Gas Company, lessee, and Supt. Forrest R. -tone, acting for Blackfeet Tribe of Indians, lessor, covering the following-described land in the Blackfeet Reservation, State of Montana

Lots 5, 6, & 7, Sec. 10, Twp. 34N, Rge. 6 W, M.M.
Lot 8, S½SW¼, Sec. 10, Twp. 34N, Rge. 6W, M.M.

Lot 5, NE¼NW¼, Sec. 34, Twp. 35N, Rge. 6W, M.M.
Lots 6 & 7, SE¼NW¼, NE¼SW¼, Sec. 34-35N-6W, M.M.
Lot 8, SE¼SW¼, Sec. 34, Twp. 35N, Rge. 6W, M.M.
Lots 5 & 6, Sec. 3, Twp. 34N, Rge. 6W, M.M.

Now, therefore, for and in consideration of One Dollar ($1.00) dollars, the receipt of which is hereby acknowledged, the said Consolidated Gas Company, the lessee in the above-described lease, hereby bargains, sells, transfers, assigns, and conveys all its right, title, and interest of the lessee in and to said lease, subject to the approval of the Secretary of the Interior, to The British American Oil Producing Company.

In witness whereof the said lessee has hereunto caused its corporate name to be subscribed and seal affixed by its duly authorized officers this 23rd day of March, 1935.

Consolidated Gas Company, by James W. Johnson, President.

Attest: P. R. MacHale, Secretary. (Corporate Seal.)

[fol. 19] Acknowledgment of Corporation

STATE OF MONTANA,
County of Toole, ss:

On this 23rd day of March, A. D. 1935, before me, a Notary Public within and for the State and county aforesaid, personally appeared James W. Johnson and P. R. MacHale to me personally known, who, being by me duly sworn, did each say that James W. Johnson is the president and P. R. MacHale is the secretary of Consolidated Gas Company, a corporation, and that the seal affixed to the foregoing and annexed instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said James W. Johnson and P. R. MacHale duly acknowledged that they each had in their said official capacities executed the foregoing instrument as the act and deed of the said company for the consideration and purposes therein mentioned and set forth; and I do hereby so certify.

Witness my hand and seal on this 23rd day of March 1935.

M. L. Gilroy, Notary Public for the State of Montana, Residing at Shelby, Montana. My commission expires March 20, 1932. (Notarial Seal.)

Acceptance by Assignee

The assignee in the above and foregoing assignment, made subject to the approval of the Secretary of the Interior hereby accepts such assignment and agrees to fulfill all the obligations, conditions, and stipulations in said-described indenture of lease, when assigned and the rules and regulations of the Secretary of the Interior, so far as applicable thereto, and to furnish proper bond guaranteeing a faithful compliance with the said lease and this agree-
[fol. 20] ment.

In witness whereof the said assignee has hereunto set its hand and seal this twelfth day of April, 1935.

The British American Oil Producing Company, by W. K. Whiteford, Vice-President.

Attest: R. M. Pitcher, Secretary.

Consent of Surety

The Central Surety and Insurance Corporation, of Kansas City, Missouri surety for Consolidated Gas Company on the bond accompanying the lease above described, hereby consents to the assignment and transfer of said lease as above made and agrees that bond shall remain in force and effect covering obligations of assignee.

Dated at Tulsa, Oklahoma, this 15th day of April, 1935.

Central Surety and Insurance Corporation, by G. B. Gilliland, Attorney in Fact.

Department of the Interior, Washington, D. C., August 15, 1935.

Approved: Oscar L. Chapmen, Assistant Secretary of the Interior.

(Stamp.)

[fol. 21] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER TO SHOW CAUSE—Filed Nov. 8, 1935

The above named plaintiff, having filed in the office of the Clerk of the above entitled Court, its complaint praying for an order of this Court that the above named defendants be restrained by injunction of this Court from proceeding with the computing assessment levying and collecting of any of the taxes mentioned and set forth in said complaint.

And it appearing that said complaint was filed herein with the permission and consent of the Court.

It is hereby ordered that the above named defendants appear before the above Court at the Court Room thereof at Helena, Montana, on the 9th day of December, 1935, at 10 o'clock A. M. and show cause if any there by why the injunction prayed for in said complaint should not be issued.

Dated this 8th day of November, 1935.

A. T. Porter, Clerk.

[File endorsement omitted.]

[fol. 22] IN SUPREME COURT OF MONTANA

[Title omitted]

COMPLAINT IN INTERVENTION—Filed Dec. 10, 1935

Comes now The Blackfeet Indian Tribe, through its Tribal Business Council, in such matter duly authorized, and, leave of this Honorable Court first had and attained, for its Complaint in Intervention respectfully shows the Court:

I

That Complainant in Intervention is an Indian Tribe whose members, duly enrolled in accordance with the laws of the United States reside within the confines of the Blackfeet Indian Reservation in the State of Montana pursuant to and under the provisions of treaties between said Tribe and the United States of America. That Complainant is a body politic duly constituted by the laws of the United

States, and is governed by its Tribal Business Council under the Supervision of the Secretary of the Interior of the United States.

[fol. 23]

II

That all of the lands which are embraced within the confines of said Tribal Reservation, except lands upon which patents in fee have issued, are held and owned by the United States of America in trust either for the benefit of the Blackfeet Indian Tribe or for the benefit of individual members of such Tribe to whom "trust patents" have been issued.

III

That on or about the 17th day of October, 1955, a treaty was entered into between the United States and said Blackfeet Tribe, therein designated as the Blackfeet Nation, whereunder said Tribe or Nation was given exclusive jurisdiction over the territory extending from the Continental Divide east to the point where the Milk River empties into the Missouri River.

IV

That thereafter and in consideration of the payment of monies and the making of further promises by the United States the territory of such Reservation was reduced by agreement between the United States and said Tribe, and that pursuant to said agreements, and in consideration of the relinquishment of a large area of land by said Tribe it was understood by said Tribe and the members thereof that the lands embraced within said Reservation should be forever free from taxes levied by any local or state authority. That said agreement and understanding was in full force and effect at the time of the admission of the State of Montana into the Union and at the time of the adoption of a Constitution by the State of Montana.

V

That subsequent to the year 1896 it was agreed that the lands embraced within said Reservation should so far as necessary to furnish the members of said Tribe with lands should be allotted in severalty, under the existing laws of the United States, and that the title to the lands so allotted

should be held by the United States for a period of 25 years in trust for the benefit of such individual allottees, and that [fol. 24] as long as the title to said lands should be held in trust, as aforesaid, said lands should be free from the levy of any tax by local or state authorities. That no allotments under trust patents have been made upon lands within said Reservation since the year 1919.

VI

That upon lands embraced within the confines of said Reservation and held in trust, as aforesaid, by the United States for the benefit of said Tribe or individual members thereof, oil and gas leases have been given under the authority of the United States and with the consent of said Tribe and said individual members thereof. That said leases are upon lands with respect to which no taxes may be assessed or levied by the State of Montana.

VII

That upon a portion of said lands, under lease as aforesaid, oil wells have been drilled which said wells, for a period of more than one year have been producing oil in commercial quantities.

VIII

That by said oil and gas leases aforesaid it is provided that said Tribe or said individual allottee as the case may be shall be entitled to receive from the lessees named therein a 12½ per cent royalty payable in money from all oil produced and saved from said lands, and at all times since the production of oil from said wells said royalties have been and now are being paid to the United States for the benefit of said Tribe or said individual allottees as the case may be.

IX

That despite the fact that said oil is being and has been produced from tax exempt lands, as aforesaid, and despite the fact that the royalties derived from the production of said lands are held and owned by the United States in trust, as aforesaid, the State Board of Equalization and the members thereof have threatened and do now threaten to, and will unless enjoined by order of this Honorable Court, pro-

ceed to levy the net proceeds tax provided for under the provisions of section 2088 to 2096 R. C. M. 1921 inclusive, as amended as a license tax upon the business of producing [fol. 25] oil from said leases aforesaid.

X

That by reason of the fact that said lands and leases, and the oil produced therefrom, are exempt from taxation, as aforesaid, said lands, and the leases thereon, have for a long period of time, had a value in excess of leases upon lands outside of said Reservation upon which said taxes have been and now are levied. That should said Board be permitted to levy said taxes upon the lands within said Reservation, aforesaid, said lands will become greatly reduced in value for leasing purposes, and said taxes will constitute a direct burden upon lands and property owned by the United States, in violation of said treaties and agreements and of the provisions of the Constitution and Statutes of the State of Montana.

XI

That by reason of the treaties, agreements and statutes of the United States, and the Enabling Act, the Constitution and the statutes of the State of Montana said lands, the oil and gas produced therefrom and the royalties derived therefrom are exempt from taxation, and that said Tribe and the individual members thereof have a vested property right in such tax exemption, and that to permit the levy of such tax upon said oil and gas so produced and upon said royalties would deprive said Tribe and said members of property without due process of law, in violation of the provisions of the Constitution of the United States and would impair the obligations of contracts, treaties and agreements between said Tribe and said individual members and the United States, and between the State of Montana, and the United States in violation of the provisions of the Constitution of the United States and the State of Montana.

Wherefore, Complainant in intervention respectfully prays:

1. That said defendants be restrained by order and decree of this Court from computing, assessing, levying or collecting any of said tax or taxes described in this complaint;

2. For such other and further relief as to the Court may [fol. 26] seem equitable, proper and just.

Hall & McCabe, Great Falls, Montana, Attorneys for Intervener.

[fol. 27] *Duly sworn to by H. C. Hall. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 28] IN SUPREME COURT OF MONTANA

[Title omitted]

DEMURRER OF DEFENDANTS TO COMPLAINT—Filed Dec. 10, 1935

Come now the defendants above named and demur to the complaint of plaintiff on file herein upon the following grounds, to-wit:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint does not state facts sufficient to entitle the plaintiff to the relief sought or any relief.

Raymond T. Nagle, Attorney General; Jeremiah J. Lynch, First Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 29] IN SUPREME COURT OF MONTANA

[Title omitted]

DEMURRER OF DEFENDANTS TO COMPLAINT IN INTERVENTION—Filed Dec. 13, 1935

Come now the defendants above named and demur to the complaint in intervention of the Blackfeet Indian Tribe on file herein upon the following grounds, to-wit:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint does not state facts sufficient to entitle the plaintiff to the relief sought or any relief.

Raymond T. Nagle, Attorney General; Jeremiah J. Lynch, First Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 30] IN SUPREME COURT OF MONTANA

[Title omitted]

STIPULATION RE AMENDMENT OF COMPLAINT—Filed Dec. 10, 1936

It is hereby stipulated by and between counsel for the respective parties to the above-entitled action:

I. That the Complaint herein may be amended by inserting after the word "the" (the last word in line one of Paragraph III) the following:

"United States of America, for the benefit of."

II. That the copy of Patent and certificate attached thereto, which are attached to this stipulation as Exhibit "A", may be considered by this Court for every purpose in the determination of this action; and that all of the lands embraced in the oil and gas lease described in the Complaint herein were granted to various Indians in the Blackfeet Indian Reservation by Patents in form identical with that contained in said Exhibit "A", which said Exhibit "A" may be deemed attached to and made a part of said complaint.

E. K. Cheadle, Jr., G. S. Frary, Attorneys for Plaintiff. Raymond T. Nagle, Jeremiah J. Lynch, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 31] EXHIBIT "A" TO STIPULATION

1037035.
25338-21. I.O.

702.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that Susan Rider, an Indian of the Blackfeet Reservation, has been allotted the following-described land:

The southwest quarter of the northwest quarter of Section five in Township thirty north and the lot five of Section ten in Township thirty-four north all in Range six west of the Montana Meridian, Montana, containing eighty-five acres and twenty-five hundredths of an acre;

Now Know Ye, That the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and incumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said Land, or cause said Land to be sold for the benefit of said heirs as provided by law; and there is reserved from the lands hereby allotted, a right of way thereon for ditches or canals constructed by the authority of the United States. Also reserving, to the United States, in accordance with the provisions of the Act of June 30, 1919 (41 Stat., 17), all minerals, including coal, oil and gas, for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct.

In testimony whereof, I, Warren G. Harding, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the Eleventh day of August in the year of our Lord one thousand nine hundred and Twenty-Two and of the Independence of the United States the one hundred and Forty-Seventh.

By the President: (Signed) Warren G. Harding. By (Signed) Ada Braddick, Assistant Secretary. (Signed) John O'Connell, (Acting) Recorder of the General Land Office.

Recorded: Patent Number 875783.

[fol. 32] STATE OF MONTANA,
County of Glacier, ss:

I hereby certify that the foregoing is a full, true, exact and correct copy of the original Patent covering the SW/4 NW/4, Section 5, Township 30, North, and Lot 5, Section 10, Township 34, North, all in Range 6, West of the Montana Meridian, Montana, containing eighty-five acres and twenty-five hundredths of an acre on record in the Office of the Indian Department of the Department of the Interior of the United States at Browning, Montana, and that said Patent is a part of the Original records of said office. And I further certify that all of the land described in and covered by that certain Oil and Gas Lease executed by Forrest R. Stone, Lessor to Consolidated Gas Company, dated July 10, 1935, No. 107, is allotted land in the Blackfeet Indian Reservation, allotted to various Indians by Patents in form identical with the above.

H. M. Knutson, Acting Superintendent of the Blackfeet Indian Reservation.

[fol. 33] [File endorsement omitted.]

IN SUPREME COURT OF MONTANA, DECEMBER TERM, 1935

No. 7605

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, a Corporation, Plaintiff,

v.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, and James H. Stewart, John J. Greene and Sam D. Goza, Members of Said Board, Defendants

Submitted December 10, 1935. Decided January 22, 1936

OPINION—Filed January 22, 1936

[fol. 34] Mr. Justice ANDERSON delivered the Opinion of the Court:

Plaintiff, the owner of a producing oil and gas lease on certain lands within the Blackfeet Indian Reservation, brought this original proceeding to secure an injunction against the State Board of Equalization and the individual members of the board in their official capacity, to enjoin them from collecting the "corporation license tax," the "operators' net proceeds tax," the "gross production tax," and the "royalty owners' net proceeds tax" arising out of the production and recovery of oil from the leased lands and premises.

In its complaint plaintiff alleges its corporate capacity and the official capacity of the defendant board. It is then alleged that prior to July 10, 1934, the Blackfeet Tribe of Indians, of the reservation bearing the same name in Glacier county, was the owner of all the oil and gas and other minerals in and under certain described lands, and that on the latter date, acting in accordance with a resolution of the Blackfeet Tribal Council dated June 10, 1934, and in accordance with the provisions of the laws of the United States and the regulations of the Department of the Interior, and for a good consideration, the superintendent of this Indian reservation as lessor made and delivered to Consolidated Gas Company, a corporation, as lessee, a certain oil and gas lease describing these lands, for a term of

five years from the date of the approval of the lease and as long thereafter as oil or gas was found in paying quantities. Thereafter, on October 5, 1934, this oil and gas lease was duly approved by the First Assistant Secretary of the Interior as required by law and the regulations of the Department of the Interior. It is then alleged that thereafter, and for a good and valuable consideration, the lessee sold, assigned and transferred to the plaintiff the lease and all [fol. 35] right, title and interest therein, which assignment was on August 5, 1935, duly approved by the Assistant Secretary of the Interior as required by the laws of the United States and the regulations of the Department of the Interior, and that pursuant to the terms and provisions of the lease plaintiff entered upon the lands, and during the years 1934 and 1935 drilled to completion ten oil and gas wells, all of which were productive of oil or gas in paying quantities.

It is further alleged that the plaintiff in the development and operation of these oil and gas wells is acting as an instrumentality and agent of the United States of America, and as such is not taxable by the State of Montana, and that the State of Montana and its officers are wholly without power to tax the plaintiff in the particulars mentioned supra.

The plaintiff alleges the nature of and the statutory authority for each of the taxes, and that the defendants are attempting and threatening to assess, levy and collect these taxes on the crude oil produced on these lands. The complaint contains other allegations necessary to invoke the original jurisdiction of this court.

The Blackfeet Tribe have by leave of this court filed a complaint in intervention, which alleges that its members are duly enrolled in accordance with the laws of the United States; that they reside within the Blackfeet Indian Reservation pursuant to and under the provisions of treaties between the tribe and the United States of America; that the complainant is a body politic duly constituted by the laws of the United States, and is governed by the tribal council under the supervision of the Secretary of the Interior, and that all of the lands embraced within the confines of the reservation, except those upon which patents in fee have been issued, are held and owned by the United States of America in trust for the benefit of the tribe. It

is then alleged that on October 17, 1935, a treaty was en-
[fol. 36] tered into between the United States and the members of this tribe whereunder the tribe or nation was given exclusive jurisdiction over certain territory; that thereafter, in consideration of payments of money, the area of this reservation was reduced pursuant to an agreement, and in consideration of the relinquishment of a large tract of land by the tribe it was "understood by said tribe and the members thereof that the lands embraced within said reservation should be forever free from taxes levied by any local or state authority," which agreement was in effect at the time of the admission of the State of Montana into the Union and the adoption of its Constitution; that subsequent to the year 1896 it was agreed that the lands embraced within the reservation should be allotted in severalty under the existing laws, the title to the lands so allotted to be held for a period of twenty-five years in trust for the benefit of the individual allottees, and that as long as the lands were so held in trust no taxes should be levied by local or state authorities; that upon lands embraced within the reservation and held in trust for the benefit of the tribe oil and gas leases have been given under the authority of the United States with the consent of the tribe, upon and under which leases wells have been drilled which produce oil and gas in commercial quantities, and that the oil and gas leases provide for the payment of a royalty of 12½ per cent, payable in money to the United States for the benefit of the tribe. It is then alleged that the oil so produced from tax-exempt lands, and the royalty derived from the production of the oil are being attempted to be subjected to the oil royalty tax pursuant to certain statutory provisions of the State of Montana, which will be hereafter noted, and that unless the taxing authorities are restrained and enjoined they will proceed to levy, collect and impose these taxes. It is further alleged that "by reason of the treaties, agreements and statutes of the United States, and the Enabling
[fol. 37] Act, the Constitution and the statutes of the State of Montana, said lands, the oil and gas produced therefrom and the royalties derived therefrom are exempt from taxation, and that said tribe and the individual members thereof have a vested property right in such tax exemption, and that to permit the levy of such tax upon said oil and gas so produced and upon said royalties, would deprive said tribe and said members of property without due process of

law, in violation of the provisions of the Constitution of the United States and would impair the obligations of contracts, treaties and agreements between said tribe and said individual members and the United States, and between the State of Montana and the United States in violation of the provisions of the Constitution of the United States and the State of Montana."

The defendants have interposed demurrers to both complaints challenging their sufficiency for substance. It was stipulated between the plaintiff and defendants that the complaint should be amended to show that all of the lands described in the oil and gas leases mentioned in the complaint were lands on which trust patents had been issued to individual Indian allottees, but all of which trust patents contained the following reservation: "Also reserving, to the United States, in accordance with the provisions of the Act of June 30, 1919 (41 Stat. 17), all minerals, including coal, oil and gas, for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct."

In the brief filed by the state subsequent to oral argument on these demurrers, it is asserted that this court is without jurisdiction to entertain the complaint in intervention of the Blackfeet Tribe and they without capacity to sue. This argument presents a serious question. (United States v. Candelaria, 271 U. S. 432.) However, in view of the conclusion which we have reached—the net result being the same as if we had sustained this contention—we shall express no opinion on it, but treat the complaint in intervention as though it was one over which we had jurisdiction [fol. 38] without doubt.

The corporation license tax law provides (secs. 2296 to 2304, inclusive, as amended by Chapter 166, Laws of 1933) for a tax "of 2 per centum upon the total net income received by such corporations in the preceding fiscal year from all sources within the State of Montana." Certain corporations are without the provisions of the act, none of which are here involved. The Act contains numerous provisions with reference to the manner of computing the tax, and provides for deductions, etc., not here important. Section 2398, as amended by Chapter 67 of the Laws of 1923, provides in part as follows: "Every person engaging in or carrying on the business of producing, within this state, petroleum, or other mineral or crude oil, or engaging in or carrying on the business of owning, controlling, managing,

leasing or operating within this state any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, sufficient in quantity to justify the marketing of the same, must, for the year 1923, and each year thereafter, when engaged in or carrying on any such business in this state, pay to the state treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in or carrying on such business in an amount equal to two per centum of the total gross value of all petroleum and other mineral or crude oil produced by such person within this state during such year." We will refer to this hereafter in the opinion as the gross production tax.

Section 2089, Revised Codes 1921, as amended by Chapter 188 of the Laws of 1935, provides: "Every person, partnership, corporation, or association engaged in mining * * * from or upon any mine whatsoever containing * * * petroleum, natural gas, or other valuable mineral or mineral deposits, must on or before the 31st day of March in each year make out a statement of the gross yield of the above-named metals or minerals from each mine owned or worked by such corporation." The statement is to be made by the proper officer to the defendant board and [fol. 39] is to contain the various matters enumerated in the section.

By the terms of section 2090, as amended by section 2 of Chapter 188 of the Laws of 1933, it is made the duty of the defendant board to compute the gross value of the product in dollars and cents so reported and to calculate and compute the net proceeds by making certain deductions from the gross product as provided in the section.

Under the terms of section 1 of Chapter 188 of the Laws of 1935, the operator is required to furnish the defendant board with the names and addresses of any and all persons owning or claiming any royalty interest in the product of the mine and the proceeds derived from its sale, and the amounts paid or yielded as royalty to each of such persons during the period covered by the statement. By section 3 of the chapter the board is directed, on receipt of the schedule setting forth the names and addresses of persons owning or claiming royalty, to assess the same at the full cash value of the money or product yielded during the preceding year, to be taxed on the same basis as the net proceeds of mines as provided by section 1999, Revised Codes of

1921. By section 5 of the chapter the board is directed to transmit at a specified time the valuation of the net proceeds of mines and mining claims for the purposes of taxation, to the county clerks of the respective counties, to be placed on the assessment roll of net proceeds of mines. By section 6 of the same Act the defendant board is directed to transmit the royalty lists to the county clerks of the respective counties who must prepare a tax roll in the personal property assessment book in the name of the operator of the mine, "and such assessments when entered shall have all the force and effect as if made in the names of the owners of such royalty individually as well as against the operator. The county treasurer shall proceed to give full notice thereof to such operator and to collect the same in manner provided by law. The operator or producer shall be liable for the payment of said taxes, and same shall be [fol. 40] payable by, and shall be collected from, such operators in the same manner and under the same penalties as provided for the collection of taxes upon net proceeds of mines; provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interest, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interest."

The first contention of the defendants is that the Blackfeet Indian Reservation is an executive order reservation, and that Congress by the Act of March 3, 1927 (44 Stat. 1347, secs. 398a, 398b, and 398c, 25 U. S. C. A. Cum. Supp. 28), has given its consent to the imposition of these taxes. The same contention was made by the same defendants in the case of Santa Rita Oil Co. v. The Board, this day decided. We there held that this contention on behalf of the state was without merit, and for the reasons there recorded and upon the authorities there cited, we again decide the contention adversely to the defendants.

Plaintiff bases its entire argument on the premise that these lands included within the leases in question are all allotted Indian Reservation lands, and argues on the authority of United States v. Rickert, 188 U. S. 432, 47 L. Ed. 532, 23 Sup. Ct. 478; Indian Territory Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. Ed. 779; Choctaw O. & G. R. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. 27; Gillespie v. Oklahoma, 257 U. S. 501, 66 L. Ed. 338, 42 Sup. Ct. 171; Jaybird Min. Co. v. Weir, 271 U. S. 609, 70 L. Ed.

1112, 46 Sup. Ct. 592, that the State of Montana is without authority to levy and impose these taxes. Certain other cases are cited by it which apply peculiarly to the royalty tax which we shall hereafter during the course of the opinion notice more in detail. We have given consideration to these decisions by the Supreme Court of the United States in the opinion in the Santa Rita Oil Company case, supra, and if the premise on which plaintiff founds its argument were sound, we should on the authority of that decision [fol. 41] hold that the imposing, levying and collecting of the gross production tax and the operators' net proceeds tax should be enjoined.

As to the corporation license tax, however, we now hold, for the reasons stated in the opinion just referred to—the facts applicable to that tax here being identical—that the contention is without merit.

It therefore becomes necessary for us to examine into and determine whether the premise on which plaintiff founds its argument is sound. True, trust patents have been issued to individual allottees covering all of the lands described in the lease, but in each of these patents the provision is found reserving the oil and gas for the benefit of the Blackfeet Tribe of Indians until Congress shall direct otherwise. It is noteworthy, in passing, that the lease, a copy of which is attached to the exhibit, after reciting the dates and the names of the parties. declares that it is executed under and in pursuance of section 3 of the Act approved February 28, 1891 (26 Stat. 795), as amended by the Act approved May 29, 1924 (Public No. 458, 68th Congress). The amendment there referred to is section 398 of Title 25, U. S. C. A., providing as follows: "Unallotted lands on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the preceding section may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, that the production of oil and gas and other minerals

on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior [fol. 42] is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner." The foregoing section applies only to unallotted lands.

As we view the situation, when the trust patents were issued containing the reservation of the oil and gas as well as other minerals, including coal, pursuant to 41 Stat. 17, a distinct estate was thereby carved out or created consisting of the reserved minerals which the United States thereafter held in trust for the benefit of the Blackfeet Tribe; this estate was distinct, separate and apart from the estate or interest which the United States held in trust for the benefit of the individual Indian allottees (Superior Coal Co. v. Musselshell County, 98 Mont. 501, 41 Pac. (2d) 14); and it follows that, as to the minerals, coal and gas, there was no allotment of these lands. This construction, as we have already pointed out, is in accord with that adopted by the original parties to this lease which was approved by the Department of the Interior, the construction of which is not to be overturned unless clearly wrong, or unless a different construction is plainly required. (Hawley v. Diller, 178 U. S. 476, 488, 44 L. Ed. 1157, 20 Sup. Ct. 986; United States v. Johnston, 124 U. S. 236, 31 L. Ed. 389, 8 Sup. Ct. 446; Miller Insurance Agency v. Porter, 93 Mont. 567, 20 Pac. (2d) 643.)

Under the provisions of section 398, Title 25, U. S. C. A., Congress has consented that the production of oil and gas on unallotted lands on Indian reservations, such as this, may be taxed by the state in which the lands are located in all respects as the same production on unrestricted lands would be taxed; and with this congressional consent there is no objection—so far as the federal Constitution and statutes are concerned—to the imposition of either the gross [fol. 43] production tax or the operator's net proceeds tax (see Jaybird Mining Co. v. Weir, supra; Mid-Northern Co. v. Walker, 265 U. S. 45, 45 Sup. Ct. 440), unless Congress has violated the treaty with the Blackfeet Tribe, or some of the agreements between the United States and this Indian tribe which were approved by Congress—to which we have

referred in our opinion this day promulgated in the case of Santa Rita Oil Co. v. The Board—and then only provided Congress by such changes has violated some constitutional right. We shall, however, consider these questions, with others in connection with our treatment of the royalty owners' tax.

Passing now to that question, it will be noted that congressional consent by section 398 of Title 25, U. S. C. A., extends not only to ordinary taxes, but to taxation of royalty interests on the lands. It is urged most strenuously by counsel on behalf of the tribe that the taxing of the royalties, if permitted to stand, is in violation of the treaties and agreements between the Indians and the United States, and also in violation of our state Constitution. Counsel rely on the cases of Choate v. Trapp, 224 U. S. 665, 56 L. Ed. 941, 32 Sup. Ct. 565; Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478, 50 Sup. Ct. 121; Morrow v. United States, 243 Fed. 854, and Carter Oil Co. v. Tax Commission, 166 Okla. 1, 25 Pac. (2d) 1092. It was held in those cases that where lands were allotted to individual Indians under an agreement that they were to remain tax-exempt for a stipulated period, on the acceptance of the allotment patent by the Individual Indian a right was vested in him which Congress was powerless to invade, in that such right was within the protection of the Fifth Amendment to the federal Constitution; but in this case the right that is invaded, if any, is a right belonging to the tribe. If it is true that the imposition of taxes on the royalties, the property of the Indian, is in violation of a treaty or agreement between the Indians and the United States confirmed by Act of Congress, that body did not exceed its power in so violating the treaty or agreement. In the case of Lone Wolf v. Hitch-
[fol. 44] cock, 187 U. S. 553, 47 L. Ed. 299, 23 Sup. Ct. 216, the court said: " 'Article 12. No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article III (VI) of this treaty.' The appellants base

their right to relief on the proposition that by the effect of the Article just quoted the confederated tribes of Kiowas, Comanches and Apaches were vested with an interest in the lands held in common within the reservation, which interest could not be divested by Congress in any other mode than that specified in said twelfth Article and that as a result of the said stipulation the interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution of the United States, and such interest—indirectly at least—came under the control of the judicial branch of the government. We are unable to yield our assent to this view.

"The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained."

Again, in the same opinion, it was said: "Plenary authority over the trival relations of the Indians has been [fol. 45] exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (Chinese Exclusion Case, 130 U. S. 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians. (Thmas v. Gay, 169 U. S. 264, 270; Ward v. Race Horse, 163 U. S. 503, 511; Spalding v. Chandler, 160 U. S. 394, 405; Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, 117; The Cherokee Tobacco, 11 Wall. 616.)

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of

the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians."

This decision of the Supreme Court of the United States has not been departed from. An examination of the decisions on which counsel rely and a comparison thereof with the decision in Lone Wolf v. Hitchcock, supra, and other decisions following that one, suggest that there is a broad distinction between tribal property and private property, and between the power to abrogate a statute or treaty and the authority to destroy individual rights acquired under a law.

It is urged that the tax may not be imposed under our [fol. 46] own Constitution—section 2 of Article XII—which provides that the property of the United States shall be exempt, and under a portion of the second section of Ordinance No. 1, which is but a copy of the second provision of section 4 of our Enabling Act, wherein it is provided "that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said state of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such Act of Congress may prescribe."

The lands under the second section of the Ordinance, which refers specifically to Indian lands, are only exempt from taxation until congressional consent to taxation is had. True, the title to these lands is held in trust by the United States, and to that extent the lands are its property; and if section 2 of Article XII stood alone, it would perhaps be sufficient to exempt these lands from taxation. The pro-

vision therein contained, however, is general, whereas the provision contained in the Ordinance relates specifically to Indian lands. In the construction of Constitutions, as well as statutes, broad and general provisions which tend in some measure to conflict with a specific one, are controlled by the specific provision. (Martien v. Porter, 68 Mont. 450, 219 Pac. 817; State ex rel. Corry v. Cooney, 70 Mont. 355, 225 Pac. 1007.)

In view of the congressional consent expressly authorizing all of these taxes found in section 398, Title 25, [fol. 47] U. S. C. A., we find no objection to the imposition and levy of these various taxes on lands such as are described in plaintiff's complaint. Accordingly, the demurrers to plaintiff's complaint and to the complaint in intervention of the Blackfeet Tribe are sustained, and the proceeding is dismissed.

Ralph J. Anderson, Associate Justice.

We concur: W. B. Sands, Chief Justice. John A. Matthews, S. V. Stewart, C. F. Morris, Associate Justices.

[fol. 48] IN SUPREME COURT OF MONTANA

[Title omitted]

PETITION FOR REHEARING—Filed Jan. 31, 1936

Comes now the above named plaintiff, British-American Producing Company, a corporation, and respectfully petitions this Honorable Court to grant a rehearing in connection with the above proceeding, and in this behalf respectfully shows the Court:

In the proceeding brought by the plaintiff it was urged upon behalf of the plaintiff that so far as concerns production of oil and gas from leases in which plaintiff was the lessee and covering lands situated upon the Blackfeet Indian Reservation the defendant State Board of Equalization was without power or authority under the laws of the United States and the laws and Constitution of the State of Montana to assess or levy against plaintiff either the corporation license tax, the gross production tax, or the net proceeds tax including the royalty tax. By its decision rendered on the 22nd day of January, 1936, this Court

determined that the plaintiff and royalty owners under leases held by the plaintiff were subject to the payment of the three above mentioned taxes.

In this petition for rehearing we shall not enter into any controversy with the Court with respect to the corporation license tax, but shall assume that the decision of the Court is proper under the authorities. The petition will, therefore, deal only with questions arising under the gross production tax (Section- 2397 to 2408, R.C.M. 1921, Laws of 1923, Chapter 67), and the net proceeds tax (Section- 2088 [fol. 49] to 2096, R.C.M. 1921, Laws of 1925, Chapter 191, Laws of 1927; Chapter- 139 and 140 Laws of 1933, Chapter 161 Laws of 1935, Chapter 188).

It is the theory of the plaintiff and the plaintiff earnestly contends herein, that the Supreme Court in rendering its decision with respect to the liability of plaintiff under the last above mentioned sections overlooked entirely statutes of the United States as well as provisions of the Constitution and laws of the State of Montana which are decisive of the questions presented to this Court.

The trust patents which this Court had under consideration in this proceeding contained a reservation of the oil and gas well as other minerals in the United States. This reservation was made pursuant to the provisions of 41 Statutes at large page 17. This is expressly recognized by the decision of this Court at page 4, paragraph 2. For the purpose of this proceeding it must be assumed that the provisions of this statute govern so far as concerns the leasing of the lands here under consideration for oil and gas. 41 Statutes 17 contains the following provisions:

"That any and all mineral including oil and gas are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct and patents hereafter issued shall contain a reservation accordingly; Provided that the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

41 Statutes page 17 is Section 10 of Chapter 4 of the Act of June 30, 1919. As a part of the same chapter enacted at the same time appears Section 26 also cited as 41 Stat. 31 which provides for the leasing of unallotted lands "for the

purpose of mining for deposits of gold, silver, copper and other valuable metalliferous minerals." Section 26 is not an amendment of Section 10, but is a part of the same chapter and Act of Congress enacted at the same time. It will be observed therefore that the only provision for leasing for oil and gas purposes is the general provision which appears in Section 10 (41 Stat. 17) heretofore quoted.

In order to more particularly define the meaning of the word "metalliferous" Section 26 Chapter 4 (41 Stat. 31) was amended by the Act of March 3, 1921, (41 Stat. 1231), [fol. 50] as follows:

"Wherever the term 'metalliferous' is used in this section it shall be defined and construed by the Secretary of Interior to include magnesite, gypsum, limestone and asbestos."

Again on December 16th, 1926 (44 Stat. 922) Paragraphs 1 and 2 of Section 26 of the Act of June 30, 1919, were amended, but such amendment again only applies to leases for the purpose of mining for gold, silver and other metals.

See U. S. C. A., Title 25, Section 399.

Section 399, U. S. C. A. Title 25 as it originally appears in the United States Codes Annotated is not a complete section, but is merely section 26 of Chapter 4 of the Act of June 30, 1919. So far as we can determine Section 10 of Chapter 4 (41 Stat. 17) which is the section under which the oil, gas and other minerals were reserved and under which the leases here under consideration were given has been omitted from the United States Code Annotated. We have been unable to find where Section 10 of Chapter 4 of the Act of June 30, 1919, has been either amended or repealed. We must assume, therefore as did the Supreme Court in its decision in this case that Section 10 (41 Stat. 17) at the time of the execution and delivery of the leases here under consideration was in full force and effect. Under such circumstances it appears to the plaintiff that the rights of plaintiff and the owners of royalty under leases held by the plaintiff must be measured by the provisions of Section 10, Chapter 4 of the Act of June 30th, 1919 (41 Stat. 17) rather than by the provision of Section 398 U. S. C. A. Title 25, (Act of May 29, 1934, 43 Stat. 244). That this is a logical deduction from the various provisions of the United States statutes seems clear upon an analysis of the provisions of such statutes.

At the outset it is apparent that so far as concerns lands upon the Blackfeet Indian Reservation there are three classes to be dealt with: (1) unallotted tribal lands; (2) lands allotted in trust; (3) lands allotted in trust as to which the oil, gas and other minerals have been reserved under the provisions of 41 Stat. 17. When we make this classification of the lands to be dealt with herein we find express provisions of the United States statutes with reference to oil and gas leases upon each of such classes. Thus lands allotted [fol. 51] in trust without a reservation of the mineral oil and gas in the United States are authorized to be leased under the provisions of Section 396 U. S. C. A. Title 25 (35 Stat. 783).

Santa Rita Oil & Gas Co. v. State Board of Equalization, decided January 22, 1936.

The leasing of unallotted lands on Indian Reservations is provided for in Section 398 U. S. C. A., Title 25, (43 Stat. 244), and the leasing of lands for oil and gas purposes as well as for the purpose of mining metals is provided for by the Act of June 30, 1919, Chapter 4, Section 10, 41 Stat. 17, and Section 26, 41 Stat. 31. Unless we make the above classification of Indian lands and apply the several statutes to the different classes as above set forth then the provisions of Section 399 U. S. C. A., Title 25, and the Provisions of Section 10, Chapter 4, Act of June 30, 1919, (41 Stat. 17) are meaningless.

In its decision this Court assumed that the leases in question were executed under the provisions of Section 398 which relates only to unallotted Indian lands. The Court arrives at this conclusion by reason of certain references appearing in the lease which is made a part of the plaintiff's complaint herein. This lease which appears as Exhibit "A" to plaintiff's complaint appears upon its face to be a lease of tribal Indian land. That is to say a lease under the first of the above classifications. In the first paragraph of such lease the Act of May 29, 1924, which is Section 398 U. S. C. A., Title 25, is referred to as being the law under which the lease is given. From a reading of the lease, however, it is most apparent that a form prepared for use in leasing tribal Indian lands was used in connection with the leases here under consideration and that the reference to Section 398 is in reality without meaning.

Thus it must be assumed that in a lease granted by the United States upon land as to which the surface title was in an individual allottee provision would be made with reference to protection of buildings, crops, etc., belonging to the owner of the surface. No such provision is made in the form used herein and appearing as Exhibit A. The lease appears to assume that the title to both the surface and the minerals is in the United States, and that no individual Indian has any right, title or interest in the surface of the lands described in the lease. It is apparent, therefore, that [fol. 52] Exhibit "A" is a mere form used not only for the leasing of tribal Indian lands, but for allotted lands as to which the oil, gas and other minerals have been reserved to the United States.

Thus interpreted the reference to the Act of May 29, 1924 (Section 391 U. S. C. A.) cannot be used as the construction placed upon the provisions of the United States statutes by the Secretary of the Interior. We agree with this Court that the oil and gas was reserved under the provisions of 41 Stat. 17. That by that reservation a distinct estate was carved out or created consisting of the reserved minerals which the United States thereafter held in trust for the benefit of the Blackfeet Tribe.

Our only controversy with the Court is with respect to its assumption that the lease was granted under the provisions of Section 398, or that the provisions of such section have any application to the lease in question or to any lease covering land allotted in trust as to which a reservation of the minerals had been made to the United States. As we have heretofore pointed out unless the lands are classified as above set forth and the proper statutes applied to each of such classes Section 10 of Chapter 4 of the Act of June 30, 1919 (41 Stat. 17) becomes meaningless. There can be no controversy herein but that Section 10 (41 Stat. 17) is still in full force and effect.

That Section which authorized and directed the reservation of the oil, gas and other minerals to the United States also specifically provides for the method under which such lands and minerals should be leased by the United States. Clearly, by the various statutes above noted a distinction has been made by the United States between unallotted tribal lands and lands which have been allotted in trust with a reservation of oil, gas and other minerals in the United

States. It is the theory and contention of the plaintiff herein that this distinction has not been noted by the Court in its decision, but that the Court has allowed itself to be mislead by the reference contained in the form of lease inadvertently used by the Department of the Interior with respect to the lands herein in question.

We are not without authority to support our contentions herein. In a letter bearing date July 15, 1935, and signed by the Commissioner of Indian Affairs, the following state-
[fol. 53] ment appears: "The leases on this reservation are authorized by provisions contained in the Act of June 30, 1919 (41 Stats. 3-17) which reserved the minerals, for the benefit of the tribe, in any lands thereafter allotted. This act contains no authorization of a state tax on the production of minerals."

"In addition to the Act of March 3, 1927 (44 Stat. 13-47) cited in your letter, there are certain other acts of Congress which authorize the levy and collection of a production tax by the states. None of these acts, however, applicable to the Blackfeet Reservation. The act of March 3, 1927, supra, relates to reservations created by Executive Order. The Blackfeet Reservation was created by treaty dated October 17, 1855 (11 Stat. 657)."

For the purpose of informing the Court as to the actual construction placed upon the leases in question by the Department of the Interior and the Commissioner of Indian Affairs we attach hereto and make a part of this petition the letter above referred to.

In its decision herein the Court assumed that the lease should be construed as coming within the provision of Section 398 by reason of the reference to that section contained in the form used by some clerk in that department. The letter from the Commissioner of Indian Affairs is attached so that the actual and true construction placed upon the leases in question by the Department of the Interior may be readily ascertained. The Court's decision is based entirely upon the proposition that the provisions of Section 398 apply. Under the above construction the Department of the Interior as well as by reason of the only logical classification of the lands here under consideration and the application of the various statutes thereto, it must be apparent that with respect to leases upon lands which have been allotted in trust with a reservation to the United

States of the oil, gas and other minerals Section 10 of Chapter 4 of the Act of June 30, 1919, is the only law applicable and that Section 398 has no bearing upon the issues presented in this proceeding. If this be true then Section 10 which is still in force and effect contains no provision either directly or by inference allowing the taxation by the State of Montana of the oil or gas produced under such leases and under the holding of this Court in the case [fol. 54] of Santa Rita Oil and Gas Company vs. State Board of Equalization, the State Board should be enjoined from levying, assessing, or collecting either the gross production tax or the net proceeds tax.

As was pointed out by this Court in its decision both in the Santa Rita Oil and Gas case and its decision in the instant case express authoritly and consent must be given by the United States before the taxes in question can be assessed, levied or collected. Section 10 gives no such consent either expressly or by implication and its follows, therefore, that the taxes may not be levied. In other words upon a proper construction of the leases in question and the statutes applicable thereto the same result should be reached as in the Santa Rita Oil and Gas Company case.

In closing this petition it should also be noticed that Section 398 U. S. C. A., Title 25, consents to the levy and collection of a tax upon the production of oil and gas. This consent has been construed by the Supreme Court of Oklahoma (41 Pac. (2nd) 918) and the Supreme Court of the United States to be limited to a tax in the nature of a property tax.

In the case of State of Oklahoma ex rel Tax Commission vs. Barnsdall Refineries, 80 Law Ed. —, Advance Opinions 6 p. 331, decided by the Supreme Court of the United States on January 6, 1936, the Supreme Court had before it the question whether an excise tax of one-eighth cent per barrel on all oil produced was within the consent of Congress under the statute allowing the collection of a tax upon the production of oil and gas produced from Indian lands. The Supreme Court in holding that such tax was an excise tax as distinguished from a property tax held that the consent of Congress must be strictly construed. Under such circumstances it would appear that the gross production tax is not even within the consent of the Congress as evidenced

by Section 398 should such section be deemed applicable herein.

Under the statutes above set forth, it is respectfully submitted that a re-hearing should be granted herein, and that the defendants should be enjoined from assessing, levying or collecting the net proceeds tax or the gross production tax against the plaintiff herein or the owners of royalty under the leases in question.

Respectfully submitted, E. K. Cheadle, Jr., G. S. Frary, Attorneys for Plaintiff. Hall & McCabe, Amicus Curiae.

[File endorsement omitted.]

[fol. 55] United States Department of the Interior,

Office of Indian Affairs,

Washington

Jul. 15, 1935.

E. K. Cheadle, Jr., Esq., Shelby, Montana.

My Dear Mr. Cheadle:

There has been referred to this office for answer your letter of June 7 directed to the Secretary of the Interior relative to the authority of the State of Montana to tax the lessee's share of proceeds received from oil and gas mining leases covering tribal lands within the Blackfeet Reservation in Montana.

Aside from provisions contained in treaties with the Indians, their tribal lands are generally regarded as exempt from taxation by the State or Federal Government, except where Congress specifically provides for taxation. See annotations to Section 348, Title 25, United States Code Annotated.

It follows that specific authorization of Congress is necessary before a State can levy and collect a production tax on minerals obtained from tribal Indians lands. The leases on this reservation are authorized by provisions contained in the Act of June 30, 1919 (41 Stats. 3-17) which reserved the minerals, for the benefit of the tribe, in any lands thereafter allotted. This act contains no authorization of a state tax on the production of minerals.

In addition to the Act of March 3, 1927 (44 Stat. 1347) cited in your letter, there are certain other acts of Congress which authorize the levy and collection of a production tax by the states. None of these acts are, however, applicable to the Blackfeet Reservation. The Act of March 3, 1927 supra, relates to reservations created by Executive Order. The Blackfeet Reservation was created by treaty dated October 17, 1855 (11 Stat. 657).

The treaty mentioned does not contain any provision specifically exempting from taxation minerals obtained from Blackfeet tribal lands. If the production tax authorized under the laws of the State of Montana were levied on the lessee's share of the proceeds received from oil and gas mining leases covering Blackfeet tribal lands, the question would then arise whether this amounts to a tax upon a Federal instrumentality and an interference by the State with the jurisdiction of the Federal Government over restricted property of the Indian. In this connection your attention is called to the case of Gillespie v. Oklahoma (257 U. S. 501) wherein the Supreme Court of the United States held the income received by a lessee from his share of the proceeds of the oil and gas under leases of restricted Indian lands was exempt from taxation by the State.

Your attention is also called to the case of Schermerhorn-Ardmore Company v. Roy Ashley, et al., Equity No. 4053, wherein the United States District Court for the Eastern District of Oklahoma held that the equipment of an oil lessee is not subject to local taxation when used in the development of restricted Indian lands on the theory that it is when so used an instrumentality of the Federal Government in pursuing its general policy in the protection and advancement of the welfare of the Indians. The decree was entered in that case February 13, 1931, enjoining the defendants from collecting taxes on property used in connection with an oil and gas mining lease covering an allotment of restricted Indians land in Oklahoma.

This office does not have available for distribution a copy of the Treaty of October 17, 1855 with the Blackfeet Indians. If you desire to examine the treaty, it is suggested that you refer to Volume 11 of the United States Statutes at large p. 657. Copy of the tribal leasing regulations is enclosed.

Sincerely yours, (Sgd.) John Collier, Commissioner.

Enclosure 647524.

[fol. 56] IN SUPREME COURT OF MONTANA

[Title omitted]

OBJECTIONS OF DEFENDANTS TO PETITION FOR REHEARING—Filed Feb. 8, 1936

Come now the defendants and object to the petition of plaintiff for a rehearing herein on the following grounds, to-wit:

I

That no question decisive of the case submitted by counsel was overlooked by the court in its decision.

II

That the decision is not in conflict with any express statute or controlling decision to which the attention of the court was not directed.

The court in its opinion in this case, as well as in its opinion in the Santa Rita Oil and Gas Company case, so fully and convincingly covered the law relating to the taxation of lessees of Indian lands and so ably and exhaustively dealt with every question which was presented that it would be nothing less supererogation on our part to attempt to justify the decision.

In the petition for a rehearing counsel for plaintiff use this language:

"At the outset it is apparent that so far as concerns lands upon the Blackfeet Indian Reservation there are [fol. 57] three classes to be dealt with: (1) unallotted tribal lands; (2) lands allotted in trust; (3) lands allotted in trust as to which the oil, gas and other minerals have been reserved under the provisions of 41 Stat. 17. When we make this classification of the lands to be dealt with herein we find express provisions of the United States with reference to oil and gas leases upon each of such classes. Thus lands allotted in trust without a reservation of the mineral oil and gas in the United States are authorized to be leased under the provisions of Section 396 U. S. C. A. Title 25 (35 Stat. 783).

Santa Rita Oil & Gas Co. v. State Board of Equalization, decided January 22, 1936.

"The leasing of unallotted lands on Indian Reservations is provided for in Section 398 U. S. C. A., Title 25, (43 Stat. 244), and the leasing of lands for oil and gas purposes as well as for the purpose of mining metals is provided for by the Act of June 30, 1919, Chapter 4, Section 10, 41 Stat. 17, and Section 26, 41 Stat. 31. Unless we make the above classification of Indian lands and apply the several statutes to the different classes as above set forth then the provisions of Section 399 U. S. C. A. Title 25, and the provisions of Section 10, Chapter 4, Act of June 30, 1919, (41 Stat. 17) are meaningless."

They are willing to tie section 399, Title 25, U. S. C. A., to section 10 of Chapter 4, Act of June 30, 1919 (41 Stat. 17), but unwilling to tie section 398, Title 25, U. S. C. A., to section 10 of Chapter 4, Act of June 30, 1919. Oil and gas in place are minerals but they are not metalliferous minerals. (Northern Pacific Railway Co. v. Soderberg, 188 U. S. 526, 47 L. Ed. 575; Morgan v. United States, 169 Fed. 242; 40 C. J. 737.) Therefore, section 399 does not cover leases of unallotted lands for oil and gas mining purposes. The same is true of section 396, Title 25, U. S. C. A. But if, as counsel must concede, in view of the position they have taken, section 399 does cover leases of unallotted lands withdrawn from entry under mining laws for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals, including magnesite, gypsum, limestone, and asbestos, in what section must the oil and gas leases [fol. 58] considered in this case find a place? The question has been admirably answered by the court itself

"It therefore becomes necessary for us to examine into and determine whether the premise on which plaintiff founds its argument is sound. True, trust patents have been issued to individual allottees covering all of the lands described in the lease, but in each of these patents the provision is found reserving the oil and gas for the benefit of the Blackfeet Tribe of Indians until Congress shall direct otherwise. It is noteworthy, in passing, that the lease, a copy of which is attached to the exhibit, after reciting the dates and the names of the parties, declares that it is executed under and in pursuance of section 3 of the Act approved February 28, 1891 (26 Stat. 795), as amended by the Act approved May 29, 1924 (Public No. 458, 68th Congress). The amend-

ment there referred to is section 398 of Title 25, U. S. C. A., providing as follows:

'Unallotted lands on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the preceding section may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, that the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.' The foregoing section applies only to unallotted lands.

"As we view the situation, when the trust patents were issued containing the reservation of the oil and gas as well [fol. 59] as other minerals, including coal, pursuant to 41 Stat. 17, a distinct estate was thereby carved out or created consisting of the reserved minerals which the United States thereafter held in trust for the benefit of the Blackfeet Tribe; this estate was distinct, separate and apart from the estate or interest which the United States held in trust for the benefit of the individual Indian allottees (Superior Coal Co. v. Musselshell County, 98 Mont. 501, 41 Pac. (2d) 14); and it follows that, as to the minerals, coal, oil and gas, there was no allotment of these lands. This construction, as we have already pointed out, is in accord with that adopted by the original parties to this lease which was approved by the Department of the Interior, the construction of which is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

Under the Act of June 7, 1897 (30 Stat. 62, 72), Quapaw Indians were empowered to lease their lands for farming

or grazing purposes for a term of three years or for mining purposes for a term of ten years. Under the Act of March 3, 1909 (25 U. S. C. A. 396), Indians generally, except members of the Five Civilized Tribes and Osage Indians in Oklahoma, were empowered to lease their lands for mining purposes for any term of years, with the consent of the Secretary of the Interior. In Hallam v. Commerce Mining & Royalty Co., 49 Fed. (2d) 103, cert. denied 284 U. S. 643, it was held that Quapaw Indians were entitled to the benefit of section 396 and so authorized to lease their lands for mining purposes under its provisions with the consent of the Secretary of the Interior.

The letter of the Commissioner of Indian Affairs which is attached to the petition for a rehearing gives no consideration whatever to section 398. Besides, it states nothing new so far as the taxation of Indian lands is concerned.

In the petition for a rehearing it is broadly intimated that in Barnsdall Refineries v. Oklahoma Tax Commission, 41 Pac. (2d) 918, and in State of Oklahoma v. Barnsdall Refineries, 296 U. S. —, 80 L. Ed. —, affirming the judgment in the former, both the Supreme Court of Oklahoma and the Supreme Court of the United States construed [fol. 60] section 398 as consenting to a tax in the nature of a property tax. As a matter of fact these courts did not construe section 398 at all, but did construe the Act of Congress of March 3, 1921, 5 (41 Stat. 1250), authorizing the levy and collection of a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and the gross production tax law and an excise tax law of Oklahoma. It was held that the Act of Congress was not broad enough to cover an excise tax. In its opinion the Supreme Court of the United States said: "The Supreme Court of Oklahoma emphasized the fact that the ⅛ of a cent per barrel tax, denominated by the statute an 'excise', is an excise tax distinguishable from a property tax in lieu of which the gross production tax is levied." Counsel for plaintiff in their brief and the Supreme Court in its opinion refer to the tax provided by section 2398, Revised Codes 1921, as amended by section 1 of Chapter 67, Laws of 1923, as the "gross production tax." It is similar in its scope to the gross production tax provided by section 12434, Oklahoma Statutes 1931.

We submit the petition for a rehearing should be denied. Raymond T. Nagle, Attorney General; Jeremiah J. Lynch, First Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 61] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Feb. 8, 1936

Motion for rehearing read, considered and denied.
John A. Matthews, Presiding-Chief Justice.

Attest: A. T. Porter, Clerk.

[fol. 62] IN SUPREME COURT OF MONTANA

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, a Corporation, Plaintiff,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA and James H. Stewart, John J. Greene and Sam D. Goza, Members of the State Board of Equalization of the State of Montana, Defendants.

JUDGMENT AND DECREE—Filed Feb. 19, 1936

This matter came regularly on for hearing before the above entitled Court on the 10th day of December, 1935, upon the verified complaint of the plaintiff, The British-American Oil Producing Company, a corporation, the verified complaint in intervention of the Blackfeet Indian Tribe, and the demurrers of the defendants, the Board of Equalization of the State of Montana, James H. Stewart, John J. Greene and Sam D. Goza, members of the State Board of Equalization of the State of Montana, Messrs. E. K. Cheadle, Jr., and G. S. Frary appearing as counsel for said

plaintiff, the Honorable Raymond T. Nagle, Attorney General, and the Honorable J. J. Lynch, Assistant Attorney General, appearing on behalf of the defendants, and H. C. Hall appearing as counsel for The Blackfeet Indian Tribe.

Whereupon oral argument was presented to the Court and briefs were filed by the respective parties and said matter was submitted to the Court.

Wherefore this Court having considered said argument and said briefs and pleadings herein and the law applicable thereto and being in all things duly advised in the premises ordered that the demurrers of said defendants to the complaint of plaintiff and the complaint in intervention of The Blackfeet Indian Tribe be sustained upon the merits and [fol. 63] said complaint and complaint in intervention be dismissed.

Wherefore by reason of the law and the premises, it is hereby ordered, adjudged and decreed that the demurrers of the defendants the Board of Equalization of the State of Montana, and James H. Stewart, John J. Greene and Sam D. Goza, members of the State Board of Equalization of the State of Montana to the complaint of plaintiff and the complaint in intervention of the Blackfeet Indian Tribe be and the same are hereby in all respects sustained and said complaint of plaintiff and the complaint in intervention of The Blackfeet Indian Tribe be and they are hereby in all respects dismissed upon the merits.

Dated this 19th day of February, 1936.

By the Court.

John A. Mathews, Acting Chief Justice.

[File endorsement omitted.]

[fols. 64 & 65] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of Montana is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.